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SOIL AND

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CONSERVATION

U. S. DEPARTMENT OF AGRICULTURE
Soil Conservation Service

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IN OUR HOMES, on our farms, in our factories, and in much of our recreation we are using water as never before.

Various water users are competing for available supplies. This is stimulating interest in water rights.

Farmers and ranchers have a twofold interest in water rights. They use water—in their homes and for livestock, irrigation, and recreation—and they manage water. They manage water by managing the land on which water falls, over which it flows, and through which it percolates. Since about 83 percent of our water supply comes from surface water, land use and management greatly affect the quantity and the quality of our total water supply.

Owners and operators of the more than 90 percent of our farms and ranches that are in soil conservation districts need to consider water rights when they plan and install soil and water conservation measures, especially those rights relating to water storage or detention, diversion, use, and disposal. Soil conservation districts and other local organizations encounter water rights when they undertake certain phases of watershed-protection and flood-prevention projects.

Kinds of Water Rights

Water rights vary from State to State. In Eastern States most water rights are based on court decisions or on common law in which land ownership is the source of the right. In Western States some water rights are based on common law, but most of them are based on legislative acts in which the source of the right is beneficial use of the water.

Certain water rights affect soil and water conservation operations and watershed-protection and flood-prevention projects more than others do. They include water rights relating to (1) diffused surface water (water not in a defined watercourse); (2) percolating ground water (diffused ground water not in a defined underground channel); and (3) water in a defined natural watercourse (stream, lake, or defined underground channel).

Riparian rights

Early American settlers in the East had few water rights' problems. They stayed close to natural watercourses where they had access to water for domestic use, for transportation and recreation, for power to grind grain, and for irrigation to grow food. There was more than enough water for everyone.

As more settlers came, conflicts over rights to water in natural watercourses were decided by applying riparian principles. These principles presumably came from the civil laws of France and the common law of England. They became part of our common or court-made law, usually with some modifications.

Under riparian principles, owners of land touching the same stream have equal rights to the use of the water. Other landowners do not have such rights.

The riparian owner has the right to have the stream flow past his land substantially unimpaired in quality and undiminished in quantity by water users above him. Each abutting landowner, however, may make a reasonable use of the stream for domestic and other purposes. All domestic uses must be satisfied before any nondomestic uses may be made. What is a reasonable use depends on supply, use, means of use, and other circumstances at the particular time and place.

Although conditions have changed a lot in recent years, riparian principles are still in effect without major changes in all of the 31 States bordering on the Mississippi River and eastward, except in Mississippi. These principles are also in effect to some extent in Oklahoma, Texas, and California.

Appropriative rights

Early settlers in the 17 Western States found conditions different from those in the East. Water was not plentiful. Arid and semiarid climates made it necessary to divert water from natural watercourses; store it so that it would be available during dry seasons; and convey it some distance for domestic, irrigation, industrial, municipal, and recreational uses. Land without water had little

value. With an adequate water supply, it had great value.

By custom, the first user of water from a natural watercourse for a beneficial purpose gained the right to use the water regardless of whether he possessed or owned land touching the stream. But to retain his right he had to use the water beneficially and have at least a possessory right in the land where the water was used.

This custom gradually evolved into State laws based on the principle of prior appropriation. Under this principle, the first or prior user of water for a beneficial purpose has the best right. His right is specific as to time, place, and amount. The right of others to use water from the same source is subject to the right of the prior user. In times of shortage any reduction to users is in reverse of the order in which they obtained their rights.

Diffused surface-water rights

Water rights relating to diffused surface water are based on court decisions dealing mainly with controlling water movement or with draining land where the water has collected. The right of capture and use is linked to ownership and use of land on which diffused surface waters collect or flow. The law varies from State to State.

Ground-water rights

Water rights relating to percolating ground water are based on both court decisions and legislative acts.

In some States the courts have applied the principle of absolute ownership. This means a landowner can use percolating ground water under his land without regard to the effects such use may have on others.

In other States the courts have ruled that (1) use of ground water must relate to reasonable use of the overlying land; (2) a landowner may not unduly waste or carelessly use the water; and (3) the water must not be taken from the overlying land for use at some remote point to the detriment of overlying landowners. The reasonable-use rule

regarding quantitative allocation of water for use has not been fully developed in most States.

In California the courts have developed the principle of correlative rights as a modification of the reasonable-use theory. Under this principle (1) all owners of land overlying ground-water basins have equal rights to reasonable beneficial use of the water; (2) surplus water may be appropriated for public use within the basin or for users outside the basin; and (3) the available supply may be divided among users during periods of water shortage.

Several States have passed laws that provide for regulating the development and use of ground water. These laws are based on the prior appropriation principle in most of the 17 Western States. In States where the common law of percolating ground water applies, regulation is intended to prevent waste and pollution and to conserve water for established users and the general public.

Eastern Water Rights

If you live in the East, you can easily run into water rights' difficulties. Riparian rights are not well defined. Reasonable use is subject to change with changing conditions of use, supply, and means of diversion. Thus, investments in water development based on riparian rights are not as dependable as they ought to be. Ground-water rights based on the common law don't offer much protection either.

In the West, if you have a water right it is usually a good one to the extent of your priority; most water rights are well defined. All the Western States have prior appropriation laws for surface waters (combined in some States with a modified common law system).

But you live in one of the Eastern States. You have a moisture deficiency almost every year, a deficiency that is greater in the Southern States than in the Northern States. You want to irrigate your crops during hot, dry spells that occur frequently.

Your choice of a water source is probably limited to a stream or a lake, a spring, diffused surface water, or a well.

Streams and lakes

Under riparian law you have limited legal protection for irrigation investments if you get water from a stream. You may do so undisturbed for several years. Or you may be sued by a riparian owner below you. Irrigation from a stream of variable flow is a gamble; other abutting land-owners can claim equal rights of reasonable use, and their uses may differ from yours. There may not be enough water for everyone. If you do not own riparian land, you may have no legal right to use stream waters in spite of your growing needs.

You do not lose riparian rights by nonuse. The riparian owner therefore may hold his right forever though he doesn't use the water.

Springs

In most States you can tap a spring on your land for irrigation water without risk if the spring doesn't form a stream. But springs often are parts of natural watercourses, or are so recognized in law, and therefore subject to the riparian principle of equal rights of all owners of land touching the stream. You can use a spring on your land for domestic purposes; in addition, you can make reasonable use for other purposes.

Diffused surface water

In most States you can capture and use diffused surface water on your land. For example, you may capture water by diversion ditches and lead it to tanks or ponds for storage. (In the Western States you might have difficulty where lower users of streams are dependent in part on rain or snow runoff for their stream supplies. In these States you need to know about laws that regulate the size of dams built to hold diffused surface waters.)

You may get into trouble for damages caused by artificial changes in the movement of the water. In some States the courts have ruled that a land-owner may ward off diffused surface waters even though he damages the land of an upper user. But the courts of other States have ruled that users

may not unduly collect, concentrate, and discharge water on their neighbors in unnatural quantities or velocities if it causes damage.

Wells

In general, you can develop and use water underlying your land, but your State may have regulations that govern the amount of water you may pump and the extent to which anyone may pollute a well or ground-water supply.

Know Your Rights

Irrigation water rights are a major problem in the East because streams often are a main source of water supply if developed and used wisely.

But you may also encounter water rights' problems when you do drainage work or build terraces, diversions, waterways, or outlets. In watershed projects, local organizations may encounter water rights' problems when they build dams, spillways, chutes, canals, culverts, floodways, outlets, or water diversions. Under the provisions of the Watershed Protection and Flood Prevention Act, Public Law 566, as amended, local organizations and water users are responsible for water rights.

In general, activities relating to storing, retarding, diverting, discharging, collecting, pumping, or otherwise artificially affecting the use of water or the damage caused by it may concern water rights.

If you live in the Eastern States you should get legal advice before adopting a soil and water conservation measure that might adversely affect the water rights of your neighbors or of other water users. Most of your water rights are not well defined in these States. This is true in some degree in the Western States where the common law is recognized.

When a conservation measure involves a water right, help given by the Soil Conservation Service is subject to compliance with State law by the individual, soil conservation district, or watershed organization being assisted. The Soil Conservation Service does not obtain or hold water rights.

Action by the States

Most of the Eastern States and several Western States—faced with rising water needs of agriculture, industry, recreation, and towns and cities—are taking steps to study their water problems and modernize their water laws. The common law of stream use has been changed substantially in Mississippi. Water-use policies have been adopted in Florida, Mississippi, South Carolina, Virginia, and a few other States. New water policies have been adopted and moderate changes made in the common law by legislation in Virginia, North Carolina, Kentucky, Indiana, Minnesota, Maryland, New Jersey, New York, Indiana, Wisconsin, and Illinois.

State study commissions have been active in New York, Massachusetts, Connecticut, Maryland, Delaware, Ohio, Indiana, Illinois, Iowa, Mississippi, Alabama, Arkansas, Louisiana, Georgia, Florida, South Carolina, North Carolina, Virginia, Tennessee, Wyoming, South Dakota, North Dakota, Kansas, Colorado, Oklahoma, Texas, Arizona, Idaho, Oregon, and California.

Most of these commissions are made up of representatives of legislatures, major water users, and agencies concerned with development and use. Some have executive directors or secretaries. Several also have fact-finding committees assigned to study (1) local water problems and needs, (2) existing laws and legal problems, (3) State-wide problems such as problems of supply, use, pollution, and climate, (4) educational problems and needs, and (5) legislative drafting problems.

Soil conservation districts are directly or indirectly represented on many of these committees or commissions. Also represented are agricultural, municipal, industrial, and recreational users and local agencies, such as irrigation, drainage, conservancy, and watershed districts.